challenge to the CAD on the grounds that the apportionment formula favored in-state investment. *Caterpillar*, 488 N.W.2d at 192. Thus the constitutional issue in *Caterpillar*, like here, concerned the validity of tax incentives for in-state investment.

Second, Respondents ignore that the court expressly considered whether the CAD would have "adverse tax consequences upon multistate taxpayers as a class," 488 N.W.2d at 193, in finding that the CAD did not violate the Commerce Clause. In other words, the Michigan Supreme Court permitted the CAD to benefit in-state investment so long as it did not penalize out-of-state interests. That is the very distinction between "laws that benefit in-state activity and laws that burden out-of-state activity" that the court below rejected as inherently "tenuous." Cuno Cert. Pet. App. at 11–12.

In sum, the decision below has further muddied an already murky area of the law. That uncertainty has dire consequences for the States' exercise of their sovereign power to tax, and for their ability to generate economic development. In light of that ongoing impact, percolation among the circuits is a luxury that Ohio's workers, and those elsewhere, simply cannot afford. Accordingly, we respectfully urge the Court to grant review and to clarify the appropriate scope of dormant Commerce Clause limitations on state tax incentives.

CONCLUSION

For the above reasons, the Petition should be granted.

Respectfully submitted,
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August 29, 2005

(14) (8)

Nos. 04-1704 and 04-1724

Supreme Court, U.S.
FILED
JUL 20 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

WILLIAM W. WILKINS, *et. al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art. I, § 8, cl.3.

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BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICAIN SUPPORT OF PETITIONERS

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of the Council On State Taxation, the National Association of Manufacturers, and the Chamber of Commerce of the United States of America as *amici curiae* in support of petitioner.

INTEREST OF *AMICI CURIAE*

The three *amici curiae* who have joined to file this brief are trade associations that represent the largest investors in our nation's state and local economies. Between the three organizations, every major business interest is represented.[1]

The Council On State Taxation ("COST"), is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST represents nearly 600 of the largest corporations in the United States, including companies from every industry segment. Many of the 45 states that impose a form of corporate income tax also incorporate some form of investment tax credit—the concept at issue in this case—or similar incentive, and most COST members have utilized investment tax credits. Thus, COST members have a financial interest in whether the investment tax credits are valid.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The members of NAM thus also have a financial interest in whether the investment tax credits are valid.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of all parties have been obtained and filed with the Clerk of the Court.

federation. With a substantial presence in all fifty states and the District of Columbia, the U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American business, the U.S. Chamber regularly advocates the interests of its members in federal and state courts throughout the country on issues of national concern.

Each of the *amici* serve business memberships that are directly impacted by the reasoning and the result reached in this case; the legal, political and economic ramifications of the Court of Appeals' decision are already reverberating for both governmental and commercial entities through the Sixth Circuit and nationwide. Hence, each of the *amici* have a vital interest in the proper disposition of this case.

The *amici* and their respective members constitute a broad swath of companies that are in a position to dramatically impact our subnational economy through new and continued investment that is designed to enhance economic development. These companies have physical presence in Ohio, each of the other Sixth Circuit states, and nationwide. This presence is associated with activities that enhance our Gross Domestic Product; generate taxable receipts and net income subject to all levels of governmental tax jurisdiction; create and improve the economic prospects for individual Americans; and promote the vitality of American communities. This presence is created through substantial capital investment by such companies, and it is sustained through continuing investment by the same companies.

SUMMARY OF ARGUMENT

Tax incentives, similar to the Ohio investment tax credit struck down by the Sixth Circuit Court of Appeals, are an important feature of state taxation. Specifically, they operate as part of an overall tax structure to mitigate tax increases that often result from increased in-state activity. Further, tax-

payers and tax jurisdictions significantly rely on the continued availability of state tax incentives; the Sixth Circuit's decision has sent taxpayers and taxing jurisdictions down a path of confusion and only this Court can restore the stability and certainty that is desperately needed.

The constitutional analysis adopted by the Sixth Circuit is flawed. "Tax-neutral decision making," as applied by the court of appeals, is an unworkable standard. Nearly every business decision is premised on tax considerations and it would be irresponsible for taxpayers to ignore tax provisions in evaluating alternatives. Further, the court's application of "tax-neutral decision making" unjustifiably leads to different results. For instance, a taxpayer with a preexisting Ohio tax liability is, under the court's theory, "coerced" by the investment tax credit into expanding in Ohio, while another taxpayer without a preexisting Ohio tax liability is not. Meanwhile, both taxpayers would be seeking the same tax benefit—an Ohio franchise tax credit available to offset *future* Ohio tax. This differing result proves that the court's utilization of the "tax-neutral decision making" standard is unworkable. This Court should grant the petition for writ of *certiorari* and overturn the Sixth Circuit's application of the "tax-neutral decision making" standard.

ARGUMENT

The question presented in this appeal is whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art. I, § 8, cl.3. However, the ramifications of this appeal are not limited to tax type, tax jurisdiction, or taxpayer.

The *amici* are uniquely positioned to know and assess the prevalence and potential economic value of incentives such as those offered by the State of Ohio (an investment tax credit against Ohio's corporate franchise tax). The companies that

make such capital investments are offered a vast array of tax and non-tax credits and incentives.[2] Some of these require affirmative action by the taxpayer (*e.g.*, application or submission of an investment plan) in order to qualify for such incentive; some are automatically available by operation of statute if the taxpayer meets certain enumerated criteria. Regardless of the administrative features of a tax incentive, many corporate taxpayers that qualify for incentives score their value highly and are required to accurately reflect their value in financial statements, estimations of effective tax rates, and assessments of return on investment.

The rationale for tax incentives is no mystery to any beneficiary of economic development initiatives. The direct beneficiaries of incentives include the corporate recipients of tax incentives; the employees and commercial partners of such corporations; the families of such employees; and the communities that accrue infrastructural benefits of "run-off" investments and commercial development (*e.g.*, retail, dining, entertainment and personal services establishments, all of which entail additional employment and payment of taxes). States and localities substantiate the use of tax incentives on a variety of grounds: to attract and to reward new investment, as well as continued investment in pre-existing plants, facilities and equipment; to replace other manufacturing and commercial enterprises that no longer provide an equivalent economic base; to compete with other localities that wish to entice economic investment within their borders; and to compete on an international playing field for these same capital expenditures.

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[2] "All states offer some form of incentives. In addition, most local governments offer incentives. These incentives may come in the form of tax reductions or abatements, financial assistance, or infrastructure grants or refunds." *Business Incentives Guide* (CCH) ¶ 105 (2005).

The memberships of *amici* can attest to the fact that the enactment of incentives also finds its justification in the mutually beneficial experience of both governmental authorities and corporate enterprises. Qualification for the typical tax incentive is premised upon the applicant meeting certain threshold levels of investment, and incentives are often explicitly premised upon the applicant maintaining a fixed level of employment, capital investment, or other economic indicia of significance to the jurisdiction that offers the incentive. Thus, while the jurisdictions that offer incentives have provided an economic benefit to the recipients of same, they also ensure that the benefits equation will balance over time. In this regard, many state and local tax incentives are drafted so as to "claw back" the incentive (*i.e.*, reverse the tax effect of an incentive that was previously taken by a corporate taxpayer), if the corporate taxpayer is determined on a retroactive basis not to have met its statutory or regulatory commitments during the period to which an incentive pertained.

The potential loss of state and local jurisdictions' ability to provide incentives, and of taxpayers' ability to utilize incentives, would have dire ramifications. First, there would be a loss of economic investment and activity to various foreign countries; and the investment made by foreign manufacturers in the United States would likely also dissipate. Second, the court of appeals' decision would undermine the United States' federal tax policy of providing incentives.[3] Third, there would be significant financial statement impacts on those companies that had been reflecting their entitlement to incentives in their calculations of profitability; the corre-

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[3] *Cf.* 26 U.S.C. (Internal Revenue Code) § 199, "Income attributable to domestic production activities" (this provision allows an income tax deduction associated with certain U.S.-based production activities), and § 965, "Temporary dividends received deduction" (this provision allows an income tax deduction for repatriating certain foreign dividends that will be invested within the U.S.).